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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. **78-888**

CHARLES NILES GROSVENOR III et al
Petitioners

v.

**THE EQUITABLE LIFE ASSURANCE SOCIETY
OF THE UNITED STATES**
Respondent

**PETITION FOR A WRIT OF CERTIORARI
To the United States Circuit Court of Appeals
For the Sixth Circuit**

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PETITION FOR A WRIT OF CERTIORARI

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For the Sixth Circuit

Petitioners, CHARLES NILES GROSVENOR III, OLIVIA POLK EVANS JEFFERDS, PHOEBE AIREY EVANS PETREE, their living and unborn children, and the MEMPHIS BANK & TRUST COMPANY, Trustee for PHOEBE AIREY EVANS PETREE, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered July 6, 1978, affirming the judgment of the United States District Court for the Western District of Tennessee, Western Division, and that on the hearing, the judgements of these Courts be reversed.

The living children of CHARLES NILES GROSVENOR III are: JULIA BRYAN GROSVENOR,

ANNE FOWLER GROSVENOR, KATHERINE BROUGHER GROSVENOR, CHARLES NILES GROSVENOR IV, and WILLIAM HENRY GROSVENOR.

The living children of OLIVIA POLK EVANS JEFFERDS are: JOSEPH CROSBY JEFFERDS, MARION EVANS JEFFERDS SINCLAIR, OLIVIA POLK JEFFERDS, and ROBERT GROSVENOR JEFFERDS.

The living children of PHOEBE AIREY EVANS PETREE are: JOHN EVANS PETREE, PHOEBE ELIZABETH PETREE, PHOEBE GROSVENOR PETREE, FLORENCE PETREE GOSNELL, and KATHERINE AIREY PETREE ASHLEY.

OPINIONS BELOW

On Oct. 27, 1976, the Honorable Robert M. McRae, Jr., Judge of the United States District Court for the Western District of Tennessee, Western Division, entered an opinion styled "Ruling on Motions for Judgment" in favor of the respondent, ruling that the gold clause in the instant contract could not be enforced. This opinion is reported in *Equitable Life Assurance Society of the United States v. Grosvenor*, 426 F.Supp. 67. A copy of this opinion is printed herein as "Appendix A."

This ruling was appealed to the United States Court of Appeals for the Sixth Circuit, where it was heard before Circuit Judges Edwards and Engel and the Honorable C. G. Neese, Judge of the United States District Court for the Eastern District of Tennessee, sitting by designation, and an opinion of the Court was ordered to be filed by the clerk on July 6, 1978, affirming the

opinion of the District Court. The opinion of the Court of Appeals has not yet been reported, and a copy is printed herein as "Appendix B."

JURISDICTION

The judgement of the Court of Appeals was entered July 6, 1978, and a timely petition for rehearing in banc was denied by an order entered Sept. 8, 1978. This petition was filed within 90 days from that date, and this Court's jurisdiction is conferred by 28 U.S.C. §1254 (1).

QUESTION PRESENTED

What are the limitations upon the power of Congress to regulate, alter and nullify private contracts, and to confiscate private property without recompense? Specifically: Having abolished all use of gold as part of the monetary system, and relegated its status to that of an ordinary commodity, does Congress have the constitutional power, by enacting Public Law 95-147, to permit enforcement of certain lease contracts executed after Oct. 28, 1977, and at the same time to prohibit enforcement of identical lease contracts executed prior to that date, where the subject matter of both contracts is rent accruing after Oct. 28, 1977, subject to a gold clause method of payment?

THE STATUTES INVOLVED

48 Stat. 113, 31 U.S.C. §463, the Joint Resolution of Congress of June 5, 1933, printed herein as "Appendix C".

Public Law 95-147, printed herein as "Appendix D"

87 Stat. 352, Public Law 93-110, as amended by 88

Stat. 445, Public Law 93-373, printed herein as "Appendix E".

STATEMENT UNDER RULE 33(2)(b)

Since the proceeding draws into question the constitutionality of the Act of Oct. 28, 1977, Public Law 95-147, an Act of Congress affecting the public interest, and neither the United States nor any agency, officer, or employee thereof is a party, it is noted that 28 U.S.C. §2403(a) may be applicable.

No Court of the United States as defined by 28 U.S.C. §451 has, pursuant to 28 U.S.C. §2403(a), certified to the Attorney General the fact that the constitutionality of such Act of Congress has been drawn into question.

STATEMENT OF THE CASE

This dispute arose out of a gold clause in a ninety nine year lease of the Sterick building, a 29 story office building in Memphis, Tennessee, the term of which lease began May 1, 1926 and will expire April 30, 2025. Respondent, as lessee under the lease, filed its Complaint for Declaratory Judgement as plaintiff against petitioners as lessors and defendants, on April 17, 1975, praying the Court to declare the gold clause unenforceable. On Oct. 27, 1976 the District Court issued its Declaratory Judgement in favor of respondent, holding that Public Law 93-110, 87 Stat. 352, as amended by Public Law 93-373, 88 Stat. 445, which repealed all other restrictions upon owning and dealing in gold on Dec. 31, 1974, had not repealed the Joint Resolution of Congress of June 5, 1933, 48 Stat. 113, 31 U.S.C. §463, which prohibited enforcement of gold clauses in all contracts. The District Court found the Joint Resolution still to be constitutional because the Court found that enforce-

ment of gold clauses would interfere with the monetary system of the United States. The Court said, in its "Ruling on Motions for Judgement,"

Congress struck down gold clauses with the Joint Resolution because they interfered with its power to establish a uniform currency.

Petitioners appealed to the United States Court of Appeals for the Sixth Circuit, and briefs were filed there by all parties arguing the questions of whether or not Congress intended to repeal the Joint Resolution on Dec. 31, 1974, and if not, whether it was constitutional for Congress to continue to prohibit all enforcement of gold clauses in contracts after repeal of all other gold restrictions on Dec. 31, 1974.

Then, on Oct. 28, 1977, after the briefs had been filed, but before the case had been heard, Congress enacted Public Law 95-147, which repealed the Joint Resolution as to all gold clause contracts executed after that date. This of course changed the questions at issue in this cause, and petitioners filed a motion in the Court of Appeals to remand the case to the District Court, or in the alternative to allow the parties to file additional briefs arguing the new questions at issue. On May 23, 1977, the Court issued an order which refused to remand the case, but which did allow the parties to file additional briefs arguing the new questions raised by the Act of Oct. 28, 1977, including the question presented above in this Petition for Certiorari.

On July 6, 1978, the Court of Appeals affirmed the judgement of the District Judge, ruling that Congress had the power to prohibit enforcement of the gold clause in this contract whether or not it interfered with the monetary policy of the United States. The Court simply

stated that the repeal of the Joint Resolution on Oct. 28, 1977 as to all gold clause contracts executed after that date showed that Congress did not intend to allow gold clause contracts executed prior to that date to be enforced, thus ruling Congress has the **absolute** power to abrogate these contracts whether or not any necessity for doing so exists. Petitioners' petition to rehear was denied Sept. 8, 1978, and they now file their Petition for Certiorari here.

The basis for federal jurisdiction in the court of first instance was founded upon diversity of citizenship between plaintiff and defendants, and upon the fact that the controversy concerns the monetary system of the United States, particularly 48 Stat. 113, 31 U.S.C. §463, the Joint Resolution of Congress of June 5, 1933, and the matter in controversy exceeds the sum of \$10,000.00, exclusive of interest and costs.

REASONS FOR GRANTING THE WRIT

In the past, the power of Congress to regulate, alter or nullify private contracts, and even to confiscate private property has been recognized, but heretofore it has been strictly limited to cases where such action was necessary to enable Congress to exercise some power specifically delegated to it by the Constitution, such as the exercise of the power to establish a monetary system.

In 1933, Congress undertook to establish a new monetary system by a series of laws, rules, regulations and orders, which devalued the dollar and prohibited United States citizens from owning or dealing in gold for speculative or monetary purposes. Among the laws was the Joint Resolution of Congress of June 5, 1933, which prohibited the enforcement of gold clauses in contracts.

Nearly all long term gold clause contracts were of two kinds: debt instruments, such as bonds and notes, and long term leases. The constitutionality of the Joint Resolution was upheld as to debt instruments in *Norman v. Baltimore & O. R.R.*, 294 U.S. 240 (1935), and in several closely related cases decided at the same time, and as to leases in *Holyoke W. Power Co. v. American W. P. Co.*, 300 U.S. 324 (1937). The court was careful to point out that the statute was constitutional for the sole reason that the enforcement of the gold clauses would interfere with the monetary system. In *Norman*, Mr. Chief Justice Hughes said, at 294 U.S. 311,

Despite the wide range of the discussion at the bar and the earnestness with which the arguments against the validity of the Joint Resolution have been pressed, these contentions necessarily are brought, under the dominant principles to which we have referred, to a single and narrow point. That point is whether the gold clauses do constitute an actual interference with the monetary policy of the Congress. . .

The Court recognized that the law frustrated the intent of the parties, and defeated their expectations by taking the property of the lessors and giving it as a wind-fall profit to the lessees, but the Court found that this was necessary to protect the monetary system. In *Holyoke*, Mr. Justice Cardozo said, at 300 U.S. 341,

In the last analysis, the case for the petitioner amounts to little more than this, that the effect of the Resolution in its application to these leases is to make the value of the dollar fluctuate with variations in the weight and fineness of the monetary standard, and thus defeat the expectation of the parties that the standard would be constant and the value relatively stable. Such, indeed, is the effect, and the covenant of the parties is to that

extent abortive. But the disappointment of expectations, and even the frustration of contracts may be a lawful exercise of power when expectation and contracts are in conflict with the public welfare.

By December 31, 1974, the United States had again established a new and different monetary system, and gold had been abolished from the new system. On that date Public Law 93-110, 87 Stat. 352, as amended by Public Law 93-373, 88 Stat. 445, became effective, repealing all the rules, regulations and orders which had prohibited United States citizens from owning or dealing with gold for monetary or speculative purposes. A few weeks before this repeal became effective, the Treasury Department and the Federal Reserve issued a series of press releases, rules and regulations announcing that this Act had not repealed the Joint Resolution, and in a series of cases, including the instant case, the Courts agreed, ruling that the language of the repealing Act was insufficient to repeal the Joint Resolution, and therefore no citizen could make or enforce gold clauses in contracts. *Southern Capital v. Southern Pac. Co.*, 568 F.2d 590, cert. denied May 30, 1978, *Henderson v. Mann Theatres Corp. of California*, 65 Cal.App.3d 397; 135 Cal. Rptr. 266, cert. denied Oct. 3, 1977, and *Feldman v. Great Northern Railway Company*, 428 F.Supp. 979 (1977). All these cases were decided prior to the enactment of Public Law 95-147. Although certiorari was not denied in *Southern Capital* until May 30, 1978, the bond at issue in that case fell due March 1, 1977, before repeal of the Joint Resolution by Public Law 95-147.

As soon as it became apparent that Congress had failed to repeal the Joint Resolution in 1974, a number of measures were introduced in both Houses of Congress specifically to repeal it. The author and principal sponsor of the legislation which finally did repeal it, Senator

Jesse Helms, first introduced his bill, S. 3563, on June 14, 1976, and the Congressional Record for that day reported the bill on page S 9127 as follows:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

Sec. 1. That the Congress finds and determines that:

(a) the prohibition from entering into contracts requiring payment in currencies of other nations, gold or gold coin, is an unreasonable infringement upon the rights of Americans.

(b) such prohibition inequitably prevents Americans from exercising this right to protect themselves against inflation, and thus:

(1) is inconsistent with Acts of Congress mandating inflation-related income increases for Social Security recipients, Federal employees, Members of Congress, and others;

(2) is inconsistent with the right of Americans to enter into private financial agreements, including labor contracts providing for automatic salary increases;

(c) such prohibition does not significantly affect the stability of the value of the dollar in foreign exchange markets; such value being primarily determined in the long run by domestic fiscal and monetary policies, the financial and monetary conditions within the United States and its major trading partners, and changing patterns of international trade;

(d) such prohibition is inconsistent with the freedom of Americans to hold, sell and deal in gold, as established by Public Law 93-373.

(e) such prohibition, by preventing Americans from exercising the aforementioned rights to protect themselves from the results of imprudent monetary policies, has reduced needed incentives to monetary authorities to adopt policies which would preserve the value of the dollar.

Sec. 2. That the joint resolution of June 5, 1933, entitled "Joint resolution to assure uniform value to coins and currencies of the United States" (31 U.S.C. 463) is hereby repealed.

The above bill shows unequivocally that enforcement of gold clauses, regardless of the date of the contract, would in no way interfere with any present policy of Congress, monetary or otherwise, and if it had become law unchanged, there is no doubt that all gold clauses in lease contracts would have become enforceable, including those executed prior to 1933. On the other hand, even if the bill had become law unchanged, there is very little likelihood that the pre-1933 gold clause bonds would have become payable according to their gold clauses, because the amount of principal to be repaid was indexed to gold, now an ordinary commodity, no longer legal tender or part of the monetary system. Under the law, the excess number of dollars required to be repaid over the number of dollars borrowed constitutes interest, by definition, and the great increase in the dollar value of gold since 1933 would cause the usury statutes to prohibit enforcement of these gold clauses. *Aztec Properties v. Union Planters National Bank*, 237 Tenn. 756; 530 S.W.2d 756, *Olwine v. Torrens*, 236 Pa.Super. 51, 344 A.2d 665. However, Senator Helms became convinced that his bill might mandate payment of the pre-1933 gold clause bonds in gold, so he decided to change the wording of this legislation to specifically make enforceable only gold clause contracts entered into after the date of the Act. The reason for this change had

nothing to do with the monetary system or the general welfare of the United States, the change was made solely to protect the private interests of the issuers of outstanding pre-1933 gold clause bonds. Indeed, Senator Helms stated plainly that it made no difference whether the Courts decided these bonds were enforceable or not, and for this reason he did not wish to prejudice the case one way or the other. Senator Helms explained this as follows, in the Congressional Record of August 11, 1976, p. S 15057:

Since I introduced my bill on this subject, S. 3563, none of my arguments have been contested. I am afraid that the status quo is the main thing that the gold clause prohibition has going for it. The other thing is the unnatural fear of gold that all midlevel bureaucrats in the Treasury Department seem to have.

The text of my amendment is slightly different from that of the bill I have introduced on this topic. My amendment, if approved, would make enforceable, gold clause contracts entered into after the enactment of the amendment. It is intended to stand neutral with regard to the enforceability of gold clause obligations issued in the past. It has come to my attention that there is at least one case pending in the courts which would require gold clause bonds issued before the 1933 resolution, be paid in gold. Since this matter is in the courts, I would not want my legislation to prejudice the case one way or another.

Mr. President, I ask unanimous consent that my amendment be printed in the Record at this point.

There being no objection, the amendment was ordered to be printed in the record, as follows:

At the end of the bill add the following new section:

Sec. ____ The joint resolution entitled "Joint resolution to assure uniform value to the coins and currencies of the United States," approved June 5, 1933 (31 U.S.C. 463), shall not apply to obligations issued on or after the date of enactment of this section.

The text of the above amendment, unchanged, finally became law on Oct. 28, 1977, as Public Law 95-147, Sec. 4, (c). Neither Senator Helms nor any other member of Congress has ever made any pretext that enforcement of pre-1933 gold clause contracts now interfere in any way with any policy of Congress, monetary or otherwise. Nevertheless, the effect of the Act of Oct. 28, 1977 is to single out a small handful of lessors who happen to own property leased under otherwise valid pre-1933 gold clause leases, and to arbitrarily deny them the privilege of enforcing their gold clauses, while granting to all other citizens this same privilege. Such a statute is clearly unconstitutional under the rule of *Norman and Holyoke*, and the decision of the Court of Appeals below to the contrary is in error.

CONCLUSION

The decision of the Court of Appeals, if allowed to stand, will serve as a precedent to give Congress absolute power to regulate, alter or nullify private contracts for any purpose whatsoever. It may even be construed to recognize the authority of Congress to enact legislation similar to the "Agrarian Reform" laws of Communist China, under which the property of landlords was confiscated and distributed among their tenants.

That decision should be reversed, and an order for a Declaratory Judgement entered to the effect that the gold clause in the Sterick lease may now be enforced in

the same manner as similar gold clauses in all new leases have been enforceable since Oct. 28, 1977.

Respectfully submitted,
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APPENDIX "A"

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE**

WESTERN DIVISION

**THE EQUITABLE LIFE
ASSURANCE SOCIETY
OF THE UNITED STATES**

Plaintiff,

vs.

**CHARLES NILES
GROSVENOR III,
et al.,**

NO. C-75-168

RULING ON MOTIONS

FOR JUDGMENT

Plaintiff, The Equitable Life Assurance Society of the United States (hereinafter called "Equitable" or "plaintiff"), filed its Complaint for a Declaratory Judgment herein seeking an adjudication of the rights of the parties under a certain written lease agreement. The particular controversy at issue relates to whether Equitable as lessee must pay rent to the defendants in the amount of \$1,500 a month in currency of the United States or whether it must pay such rent in gold coins of the standard weight and fineness as of May 1, 1927, or the equivalent thereof in currency of the United States. Defendants have demanded payment of the \$1,500 rental in currency equivalent to \$1,500 in gold coin of the standard weight and fineness as of May 1, 1927. According to defendants, \$1,500 in gold coin of the standard weight and fineness as of May 1, 1927, equals

72.5625 troy ounces of fine gold. The rental demand for the month of January 1975 was for the sum of \$13,469.63, or 72.5625 troy ounces of fine gold multiplied by \$186.00, which was the price of one fine troy ounce of gold on January 2, 1975. This rental sum will change monthly as the market price of gold fluctuates.

Equitable seeks the Judgment of this Court that its obligation to pay rent is dischargeable by the payment each month of \$1,500 in currency.

Jurisdiction is founded upon diversity of citizenship between Equitable and the defendants and the fact that the action arises under the laws of the United States concerning the monetary system of the United States. The matter in controversy exceeds, exclusive of interest and costs, the sum of \$10,000.

The defendants are all the parties who have an interest, either vested or in expectancy, in certain real property in Memphis, Tennessee, upon which a multi-story office building known as the Sterick Building is situated. All of the defendants are properly before the Court. Guardians Ad Litem have been appointed to represent unborn children who upon their birth would have an interest in the real estate involved herein, and to represent the defendants who are minors.

All of the defendants have filed Answers. All of the defendants except Memphis Bank & Trust Company, Trustee, have filed a Counter-Claim for Declaratory Judgment. An Answer to such Counter-Claim has been filed by Equitable. Simply stated, the Counter-Claim seeks a Declaratory Judgment that would have the opposite effect of the Declaratory Judgment sought by plaintiff.

Plaintiff filed a Motion for Judgment on the Pleadings based upon the allegation that there is no genuine issue as to any material fact as shown by the pleadings and plaintiff is entitled to a Judgment as a matter of law.

Subsequently a Motion for a Summary Judgment was filed in behalf of all the defendants. The case has been thoroughly briefed and an oral argument was presented on the respective Motions. The Court is of the opinion that there is not a disputed material issue of fact and that the case may be determined on the present record as a matter of law.

By lease dated May 1, 1927, the predecessors in title to the defendants of the land upon which the Sterick Building is situated leased such land to the predecessors in interest of the plaintiff herein. The original lessee and its successors in interest have constructed, and there is now maintained, improvements of substantial value upon the subject real estate. Section Two of said lease provides as follows:

TERM, RENTAL AND TAXES

TO HAVE AND TO HOLD the same for the full term of ninety-nine years, beginning on the first day of May, Nineteen Hundred and Twenty-Six (1926) and ending on the Thirtieth day of April, Two Thousand and Twenty-Five (2025) at noon, at which last mentioned date and time, the term hereby created shall be fully and absolutely completed and terminated. The said Lessee hereby agrees and covenants with the said Lessor to pay as and for the rent of the above described premises each year during the full ninety-nine years, being the full term of said lease, the sum of Eighteen Thousand (\$18,000.00) Dollars per annum, without any deduction or abatement whatever, in equal

monthly installments of Fifteen Hundred (\$1,500.00) Dollars each, in advance, one monthly installment to be paid on the first day of each and every month of each and every year during the full term of this lease; all of which rent and each monthly installment shall be paid by the Lessee to the Lessor in gold coin of the United States of America of the present (the date of the execution of this instrument) standard weight and fineness, or its equivalent to be determined at the time of the payment of each separate monthly installment of rent. (Emphasis supplied).

Plaintiff contends that the boldfaced provision of said Section Two, relative to payment in gold or its equivalent, was abrogated and made null and void when Congress enacted the law set out below by Joint Resolution of June 5, 1933, which law sometimes will be referred to hereinafter as the "Joint Resolution" and that said Joint Resolution remains in full force and effect to the present date:

JOINT RESOLUTION

To assure uniform value to the coins and currencies of the United States.

Whereas the holding of or dealing in gold affect the public interest, and are therefore subject to proper regulation and restriction; and

Whereas the existing emergency has disclosed that provisions of obligations which purport to give the obligee a right to require payment in gold or a particular kind of coin or currency of the United States, or in an amount of money of the United States measured thereby, obstruct the power of the Congress to regulate the value of the money of the United States, and are incon-

sistent with the declared policy of the Congress to maintain at all times the equal power of every dollar, coined or issued by the United States, in the markets and in the payment of debts. Now, therefore, be it

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That (a) every provision contained in or made with respect to any obligation which purports to give the obligee a right to require payment in gold or a particular kind of coin or currency, or in an amount in money of the United States measured thereby, is declared to be against public policy; and no such provision shall be contained in or made with respect to any obligation hereafter incurred. Every obligation heretofore or hereafter incurred, whether or not any such provision is contained therein or made with respect thereto, shall be discharged upon payment, dollar for dollar, in any coin or currency which at the time of payment is legal tender for public and private debts. Any such provision contained in any law authorizing obligations to be issued by or under authority of the United States, is hereby repealed, but the repeal of any such provision shall not invalidate any other provision or authority contained in such law.

(b) As used in this resolution, the term "obligation" means an obligation (including every obligation of and to the United States, excepting currency) payable in money of the United States; and the term "coin or currency" means coin or currency of the United States, including Federal Reserve notes and circulating notes of the Federal Reserve banks and national banking associations.

Plaintiff has paid monthly rent of \$1,500 in currency since June 1973, when it succeeded to the interest of lessee under said lease. In ¶11 of the Answer, defendants state that such payment fulfilled plaintiff's obligation as lessee with regard to the payment of such rent for

payments made prior to January 1, 1975, but not thereafter.

Plaintiff contends that the Joint Resolution is still in effect; that "gold clauses" are still against the public policy and of no effect; and that plaintiff is entitled to a Judgment or Decree of this Court that its obligations to pay rent under the subject lease are dischargeable by the payment of \$1,500 per month in currency of the United States.

Public Law 93-110 (87 Stat. 352) and Public Law 93-373 (88 Stat. 445), both of which became effective December 31, 1974, and which are sometimes hereinafter referred to as the "Repealing Act," provide in relevant part:

Sec. 3(a) Sections 3 and 4 of the Gold Reserve Act of 1934 (31 U.S.C. 442 and 443) are repealed.

(b) No provision of any law in effect on the date of enactment of this Act, and no rule, regulation, or order in effect on the date subsections (a) and (b) become effective may be construed to prohibit any person from purchasing, holding, selling, or otherwise dealing with gold in the United States or abroad.

(c) The provisions of subsections (a) and (b) of this section shall take effect either on December 31, 1974, or at any time prior to such date that the President finds and reports to Congress that international monetary reform shall have proceeded to the point where elimination of regulations on private ownership of gold will not adversely affect the United States' international monetary position. Public Law 93-110 (87 Stat. 352) as to subsection (a) above and Public Law 93-373 (88 Stat. 445) as to subsections (b) and (c) above.

Simply stated, it is the position of the defendants that the above quoted statutes repealed the Joint Resolution.

The reasoning of the defendants is that subsection (a) of the Repealing Act expressly repealed sections 3 and 4 of the Gold Reserve Act of 1934 (31 U.S.C. Sections 442 and 443), these being the laws which gave to the Secretary of the Treasury the authority to issue regulations prescribing conditions under which citizens could acquire, hold, transport, melt, treat, import, export or earmark gold for industrial, professional and/or artistic use (31 U.S.C. Section 442) and which provided heavy penalties for the violation of such regulations (31 U.S.C. Section 443). Until the Repealing Act was passed, ownership of gold except in accordance with the regulations of the Secretary of the Treasury was prohibited.

Defendants contend that if all Congress intended to do by enactment of the Repealing Act was to remove restrictions from citizens purchasing, holding, selling and dealing in gold as a commodity, that such could have been accomplished simply by specifically repealing 31 U.S.C. Sections 342 and 343; but defendants contend that it was also the intent of Congress to remove every restriction of any kind on citizens as related to gold, including the restriction on "gold clauses"; and that subparagraph (b) of the Repealing Act was a catchall which repealed the Joint Resolution. Defendants assert that the legislative history of the Repealing Act supports their position that the Joint Resolution was repealed by such Act.

The Joint Resolution was held to be constitutional soon after its passage in *Norman v. Baltimore and O. R. Co.*, 294 U.S. 240 (1935) and *Holyoke Water Power Company v. American Writing Paper Company, Inc.*, 300 U.S. 324 (1936) as to private obligations and in *Nortz v. United States*, 294 U.S. 317 (1934) and *Perry v. United States*, 294 U.S. 330 (1934) as to governmental obligations.

A primary issue in this case is whether the language of the Repealing Act repealed the Joint Resolution.

In order for a subsequent statute to repeal an earlier statute, the earlier one must either be expressly repealed or repealed by implication. A statute is expressly repealed when the later law designates the statute repealed in such manner as to leave no doubt as to what statute is intended.

Neither the Joint Resolution nor the codification thereof in 31 U.S.C. Section 463 is expressly mentioned in the Repealing Act. Only "Sections 3 and 4 of the Gold Reserve Act of 1934 (31 U.S.C. 442 and 443)" were mentioned.

As the Joint Resolution was not expressly repealed, the issue is whether it was repealed by implication.

Defendants contend that subsection (b) of the Repealing Act was enacted to repeal the Joint Resolution or otherwise there would have been no reason for its insertion in the Repealing Act. Defendants argue that Congress, by expressly repealing Sections 3 and 4 of the Gold Reserve Act of 1934 (31 U.S.C. Sections 442 and 443), removed all restrictions upon private citizens dealing with gold except those contained in the Joint Resolution. In other words, defendants say that except for 31 U.S.C. Section 442 and 443 there were no other laws, rules, regulations or orders in effect in 1974 that prohibited citizens from dealing with gold and thus Congress must have been directing subparagraph (b) of the Repealing Act at the Joint Resolution.

However, on the date of the Repealing Act there were in full force and effect other laws, rules, regulations and orders that prohibited or conditioned the rights of citi-

zens of the United States with regard to gold; for example, Title 31 of the **Code of Federal Regulations**, Part 53, entitled "Instructions of the Secretary of the Treasury Concerning Wrongfully Withheld Gold Coin and Gold Bullion Delivered After January 17, 1934," and Part 54 thereof entitled and containing "Gold Regulations".

Merely expressly repealing Sections 3 and 4 of the Gold Reserve Act of 1934 (31 U.S.C. Sections 442 and 443) would not have repealed these other pronouncements that had the force of law.

In considering whether earlier statutes are repealed by implication, this Court must be guided by the cardinal rule recently reiterated by the Supreme Court in **Morton v. Mancari**, 417 U.S. 535, 549 (1974); namely, that repeals by implication are not favored.

As the court also stated in **Morton v. Mancari**, at page 551:

The Courts are not at liberty to pick and choose among congressional enactments and when two statutes are capable of co-existence, it is the duty of the Courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective. "When there are two acts upon the same subject, the rule is to give effect to both if possible . . . The intention of the legislature to repeal must be clear and manifest." Citations omitted.

The principles expressed above, when applied to the case at bar, indicate that the Repealing Act did not impliedly repeal the Joint Resolution.

Congress only meant to remove restrictions upon United States citizens "purchasing, holding, selling or otherwise dealing with gold" as a commodity. There is

no showing that Congress specifically intended to repeal the Joint Resolution and allow obligations to be valued in gold.

The Joint Resolution did not prohibit the purchasing, holding, selling or otherwise dealing with gold. It only prohibited obligees from demanding payment of obligations in gold. Laws enacted prior to the Joint Resolution prohibited citizens generally from purchasing, holding, selling and dealing with gold.

The Repealing Act is a statute which was intended to again allow citizens to buy, sell, hold and deal with gold as a commodity but not to use it as an index of value to measure obligations. The two statutes are not irreconcilable. Citizens may now deal with gold as a commodity—buying, selling and holding it, contracting on futures and generally dealing with it as they would cotton or other commodities. However, Congress did not repeal the prohibition against its use as an index of value to measure obligations unrelated to their dealings in it.

The position of the defendants is that the words "or otherwise dealing with gold" as contained in the Repealing Act were meant to include such "dealing" as was prohibited by the Joint Resolution, i.e., using gold as an index of value to measure obligations; thus the Repealing Act was meant to repeal the Joint Resolution and again allow this type of "dealing".

There is a distinction between gold as a commodity and gold as an index of value. **Holyoke Water Power Company v. American Writing Paper Company, Inc.**, 300, U.S. 324 (1936). The Joint Resolution prohibited the use of gold as an index of value.

The defendants assert a second theory, namely, that

if the Court should decide that the first theory of plaintiff is correct and that the Joint Resolution was not impliedly repealed by the Repealing Act, then the Joint Resolution is unconstitutional in the light of the provisions of the Repealing Act which allow dealing in gold. Defendants say that to construe the Joint Resolution as prohibiting the payment of rent in gold causes it to become unconstitutional, under either or both the Fifth and Tenth Amendments to the Constitution of the United States.

Defendants would reason that it was only because gold was prohibited to private citizens in 1933 and used as a monetary base or related to the monetary system that Congress could prohibit "gold clauses". However, the Joint Resolution was not upheld on this basis. *Norman v. Baltimore & Ohio Railroad Co.*, 294 U.S. 240 (1935) is the leading case in this field. In the *Norman* opinion the Supreme Court discussed at some length the power of Congress to establish a monetary system as one basis for upholding the validity of the Joint Resolution. In that opinion the Court said:

The Constitution "was designed to provide the same currency having a uniform legal value in all the States." It was for that reason that the power to regulate the value of money was conferred upon the Federal Government while the same power, as well as the power to emit bills of credit, was withdrawn from the States Or as was stated in the *Julliard Case*, supra, the Congress is empowered "to issue the obligations of the United States in such form, and to impress upon them such qualities as currencies for the payment of merchandise and the payment of debts as accord with the usage of sovereign governments." The authority to impose requirements of uniformity and parity is an essential feature of this control of the currency. The Congress is authorized to provide "a sound and uniform

currency for the country," and to secure the benefit of it to the people by appropriate legislation. 294 U.S., pages 303-04

. . . It requires no acute analysis or profound economic inquiry to disclose the dislocation of the domestic economy which would be caused by such a disparity of conditions in which it is insisted, these debtors under gold clauses should be required to pay \$1.69 in currency while respectively receiving their taxes, rates, charges, and prices on the basis of \$1.00 of that currency. 294 U.S., pages 315-16¹

The holding of the Supreme Court in *Norman* may be summarized as follows: (1) Congress has the right to establish the monetary system of this country and to establish a uniform currency; and (2) a valid reason for the Joint Resolution was to establish a uniform currency and parity between kinds of currency and to make that currency dollar for dollar, legal tender for the payment of all debts. Congress struck down gold clauses with the Joint Resolution because they interfered with its power to establish a uniform currency.

For the foregoing reasons this Court concludes that the Repealing Act of 1974 did not repeal the Joint Resolution of June 5, 1933. The basis upon which the United States Supreme Court held the Joint Resolution constitutional in 1934 still exists today in that Congress still has the power to insure that all obligations shall be paid in one uniform currency. There is no material fact in dispute in this case and the plaintiff is entitled to a Declaratory Judgment as a matter of law that its obligation to pay rent under the lease involved herein was,

¹In the instant case the disparity of conditions would require the plaintiff to pay rent for the month of January 1975 in the amount of \$13,469.63 after receiving \$1500 in currency from its charges and prices.

and in the future shall be, dischargeable by the payment of \$1,500 per month in currency of the United States, which at the time of payment is legal tender. Wherefore the Clerk is hereby directed to enter a Judgment in favor of the plaintiff consistent with this ruling.

ENTER this 27th day of October 1976.

ROBERT M. McRAE, JR., JUDGE
UNITED STATES DISTRICT COURT

APPENDIX B

77-1002

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

THE EQUITABLE LIFE ASSURANCE
SOCIETY OF THE UNITED STATES,
Plaintiff-Appellee

V.

CHARLES NILES GROSVENOR, III,
et al.,

Defendants-Appellants

ORDER

Before: EDWARDS and ENGEL, Circuit Judges and
NEESE, District Judge*

Defendants appeal from a declaratory judgment entered by the district court determining that a Joint Resolution of June 5, 1933, enacted by the Congress to invalidate gold clauses, remains effective to bar enforcement of such a clause in a leasehold agreement between the parties which had originally been executed in 1927 between predecessors to the present parties. The lease pertained to a parcel of land in downtown Memphis and was to be in effect for 99 years following its execution in 1927.

Upon consideration the court is of the opinion that the district judge properly ruled that the Joint Resolution was constitutional and continues to bar enforcement of

*The Honorable C. G. Neese, Judge, United States District Court for the Eastern District of Tennessee, sitting by designation.

the gold clause in the instant contract. The court is further of the opinion that the recent amendments to the Gold Reserve Act of 1934, as contained in Public Law 95-147 and approved on October 28, 1977, support the trial judge's holding. Accordingly, for the reasons set forth in the opinion of United States District Judge Robert M. McRae, Jr., filed in the district court on October 27, 1976,

IT IS ORDERED that the judgment of the district court be and it is hereby affirmed.

ENTERED BY ORDER OF THE COURT

John A. Hehman, Clerk

APPENDIX "C"

48 Stat. 113, 31 U.S.C. 463

Joint Resolution of Congress of June 5, 1933

"JOINT RESOLUTION.

"To assure uniform value to the coins and currencies of the United States.

"Whereas the holding of or dealing in gold affect the public interest, and are therefore subject to proper regulation and restriction; and

"Whereas the existing emergency has disclosed that provisions of obligations which purport to give the obligee a right to require payment in gold or a particular kind of coin or currency of the United States, or in an amount of money of the United States measured thereby, obstruct the power of the Congress to regulate the value of the money of the United States, and are inconsistent with the declared policy of the Congress to maintain at all times the equal power of every dollar, coined or issued by the United States, in the markets and in the payment of debts. Now, therefore, be it

"Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That (a) every provision contained in or made with respect to any obligation which purports to give the obligee a right to require payment in gold or a particular kind of coin or currency, or in an amount in money of the United States measured thereby, is declared to be against public policy; and no such provision shall be contained in or made with respect to any obligation hereafter incurred. Every obligation, heretofore or hereafter incurred, whether or not any such provision is contained therein or made with respect thereto, shall be discharged upon payment, dollar for dollar, in any coin or currency which at the time of payment is legal tender for public and private debts. Any such provision con-

tained in any law authorizing obligations to be issued by or under authority of the United States, is hereby repealed, but the repeal of any such provision shall not invalidate any other provision or authority contained in such law.

“(b) As used in this resolution, the term ‘obligation’ means an obligation (including every obligation of and to the United States excepting currency) payable in money of the United States; and the term ‘coin or currency’ means coin or currency of the United States, including Federal Reserve notes and circulating notes of the Federal Reserve banks and national banking associations.

“Sec. 2. The last sentence of paragraph (1) of subsection (b) of section 43 of the Act entitled ‘An Act to relieve the existing national economic emergency by increasing agricultural purchasing power, to raise revenue for extraordinary expenses incurred by reason of such emergency, to provide emergency relief with respect to agricultural indebtedness, to provide for the orderly liquidation of joint-stock land banks, and for other purposes,’ approved May 12, 1933, is amended to read as follows:

“‘All coins and currencies of the United States (including Federal Reserve notes and circulating notes of Federal Reserve banks and national banking associations) heretofore or hereafter coined or issued, shall be legal tender for all debts, public and private, public charges, taxes, duties, and dues, except that gold coins, when below the standard weight and limit of tolerance provided by law for the single piece, shall be legal tender only at valuation in proportion to their actual weight.’

“Approved, June 5, 1933, 4:40 p.m.”

APPENDIX “D”

P.L. 95-147

(c) The joint resolution entitled “joint resolution to assure uniform value to the coins and currencies of the United States,” approved June 5, 1933 (31 U.S.C. 463), shall not apply to obligations issued on or after the date of enactment of this section.

APPENDIX "E"

Public Law 93-110, 87 Stat. 352

as amended by Public Law 93-373, 88 Stat. 445

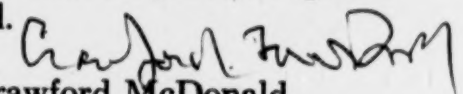
Sec. 3. (a) Sections 3 and 4 of the Gold Reserve Act of 1934 (31 U.S.C. 442 and 443) are repealed.

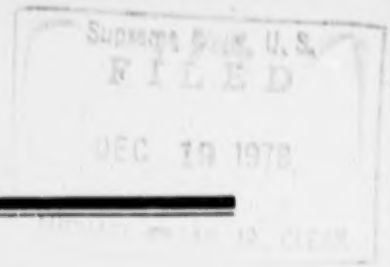
(b) No provision of any law in effect on the date of enactment of this Act, and no rule, regulation, or order in effect on the date subsections (a) and (b) become effective may be construed to prohibit any person from purchasing, holding, selling, or otherwise dealing with gold in the United States or abroad.

(c) The provisions of subsections (a) and (b) of this section shall take effect either on December 31, 1974, or at any time prior to such date that the President finds and reports to Congress that international monetary reform shall have proceeded to the point where elimination of regulations on private ownership of gold will not adversely affect the United States' international monetary position.

CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of December, 1978, three copies of this Petition for Writ of Certiorari were delivered by hand to C. Thomas Cates, Esq., Burch, Porter & Johnson, 130 North Court Avenue, Memphis, Tennessee, 38103, Counsel for the Respondent, The Equitable Life Assurance Society of the United States. I further certify that all parties required to be served have been served.


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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 78-888

CHARLES NILES GROSVENOR, III, et al.,
Petitioners,

v.

THE EQUITABLE LIFE ASSURANCE SOCIETY
OF THE UNITED STATES,
Respondent.

**RESPONDENT'S BRIEF IN OPPOSITION TO
PETITION FOR A WRIT OF CERTIORARI**
To the United States Circuit Court of Appeals
for the Sixth Circuit

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IN THE
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THE EQUITABLE LIFE ASSURANCE SOCIETY
OF THE UNITED STATES,
Respondent.

**RESPONDENT'S BRIEF IN OPPOSITION TO
PETITION FOR A WRIT OF CERTIORARI**

**To the United States Circuit Court of Appeals
for the Sixth Circuit**

Respondent, The Equitable Life Assurance Society of the United States, respectfully submits the following brief in opposition to the Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The opinion of the District Court for the Western District of Tennessee is reported at 426 F.Supp. 67. The opinion of the Court of Appeals for the Sixth Circuit is not yet reported. Copies of such opinions are set forth in Appendices "A" and "B" to the Petition.

JURISDICTION

The judgment of the Court of Appeals for the Sixth Circuit was entered July 6, 1978. A timely Petition for rehearing in banc was denied by an Order entered September 8, 1978. The jurisdiction of this Court was invoked under 28 U.S.C. §1254(1) with timely filing of the Petition for a Writ of Certiorari.

STATUTES INVOLVED

Joint Resolution of June 5, 1933, ch. 48, §1, 48 Stat. 112-24, 31 U.S.C. §463 (App. 1).*

Gold Reserve Act of 1934, Sections 3 and 4, 31 U.S.C. §§442 and 443 (repealed 1974) (App. 2).

Gold Reserve Act of 1934, Section 5, 31 U.S.C. §315b (App. 3).

Act of September 21, 1973, Section 3 ("Gold Ownership Amendment of 1973"), Pub.L. No. 93-110, 87 Stat. 352 (App. 3).

Act of Aug. 14, 1974, Section 2 ("Gold Ownership Amendment of 1974"), Pub.L. No. 93-373, 88 Stat. 445 (App. 4).

Act of Oct. 28, 1977, Section 4(c) (the "1977 Reaffirmation"), Pub.L. No. 95-147, 91 Stat. 1229 (App. 4).

(The texts of the listed statutes are set forth in the Appendix hereto.)

* "App." citations are to the Appendix hereto. "Pet. App." citations are to Petitioner's Appendix.

QUESTIONS PRESENTED

1. Was the Joint Resolution of 1933 implicitly repealed by the Gold Ownership Amendments of 1973 and 1974?

2. Did Congress by enactment of Public Law 95-147 which reaffirmed the applicability of the Joint Resolution with respect to obligations issued prior to October 28, 1977, violate Petitioners' rights of substantive due process under the Fifth Amendment?

STATEMENT OF THE CASE

This case involves the rights of the parties under a ninety-nine year lease of the land under the Sterick Building, a 29-story office building in Memphis, Tennessee. The term of the lease is from May 1, 1927 through April 30, 2025. Petitioners are the lessors and demanded from Respondent as lessee that after January 1, 1975, in accordance with a "gold clause" in the lease, that it pay the stipulated monthly rental of \$1,500 "in gold coin of the United States of America of the present (as of May 1, 1927) standard weight and fineness, or its equivalent to be determined at the time of the payment of each separate monthly installment of rent."

Respondent filed its Complaint for Declaratory Judgment against Petitioners seeking a judgment that its obligation to pay rent was and is dischargeable by the payment each month of \$1,500 in currency of the United States. Petitioners filed a Counter-Claim for Declaratory Judgment seeking to require the Respondent to pay the rent falling due on January 1, 1975, and thereafter in gold coin of the standard weight and fineness as of May 1, 1927, or the equivalent thereof in U.S. currency.

Both parties made motions for summary judgment and the District Court thereafter ruled in favor of the Respondent.

Such "gold clauses", which were widespread at the inception of the lease, were declared to be void and against public policy by the Joint Resolution of June 5, 1933, 31 U.S.C. §463, ch. 48, §1, 48 Stat. 112-13 (the "Joint Resolution") (App. 1), which provides in pertinent part, that:

"Every obligation, heretofore or hereafter incurred, . . . shall be discharged upon payment, dollar for dollar, in any coin or currency which at the time of payment is legal tender for public and private debts."

The constitutional validity of the Joint Resolution was first upheld by this Court in *Norman v. Baltimore & O.R.R.*, 294 U.S. 240 (1935), in which a gold clause almost identical to that contained in the lease in question here was declared unenforceable. The constitutionality of the Joint Resolution was subsequently reaffirmed in several other cases reaching this Court in the 1930's. See, e.g., *Guaranty Trust Co. v. Henwood*, 307 U.S. 247 (1939); *Bethlehem Steel Co. v. Zurich General Accident & Liability Co.*, 307 U.S. 265 (1939); *Holyoke Water Power Co. v. American Writing Paper Co.*, 300 U.S. 324 (1937); *Nortz v. United States*, 294 U.S. 317 (1935); *Emery Bird Thayer Dry Goods Co. v. Williams*, 107 F.2d 965 (8th Cir. 1939), *cert. denied*, 309 U.S. 655 (1940).

In granting Equitable's Motion for Summary Judgment and denying that of Petitioners, the United States District Court for the Western District of Tennessee, Robert M. McRae, Jr., U.S. D.J., held "that the Repealing Act of 1975 did not repeal the Joint Resolution of June 5, 1933" and that the "basis upon which the United States Supreme Court held the Joint Resolution constitutional in 1934, *sic*. 1935, still exists today" (Pet. App. 25).

Petitioners appealed to the United States Court of Appeals for the Sixth Circuit. After all briefs were filed but before argument, Congress, on October 28, 1977, enacted Public Law 95-147 (App. 4) which reaffirmed the Joint Resolution as to obligations issued prior to October 28, 1977, and made it non-applicable to obligations issued after that date. Supplemental briefs were then filed arguing the effect of the Act of October 28, 1977 on the issues.

On July 6, 1978, the Court of Appeals affirmed the judgment of the District Court stating:

"Upon consideration the court is of the opinion that the district judge properly ruled that the Joint Resolution was constitutional and continues to bar enforcement of the gold clause in the instant contract. The court is further of the opinion that the recent amendments to the Gold Reserve Act of 1934, as contained in Public Law 95-147 and approved on October 28, 1977, support the trial judge's holding." (Pet. App. 27-28).

Respondent submits that the lower courts rightly rejected the arguments advanced below by Petitioners.

REASONS FOR DENYING CERTIORARI

I. There Is No Conflict Among the Courts, Federal and State, as to the Continued Validity of the Joint Resolution Nor Are There Any Other Grounds Warranting Review by This Court.

This case raises no new constitutional or other question of major importance, there is no conflict in the decisions of any federal and state courts with respect to any issue presented herein, and the decision of the Sixth Circuit Court of Appeals below, affirming the decision of the District Court, is correct. Therefore, there is nothing to warrant review by this Court.

Since the enactment of the Gold Ownership Amendments, every federal and state court to consider the questions, without exception, has held that the Joint Resolution was and remains a constitutional exercise of Congress' exclusive power to issue and regulate the value of money granted in Paragraph 5 of Section 8, Article I of the United States Constitution, and that the Joint Resolution was not repealed by the Gold Ownership Amendments, which legalized the ownership of gold. *Southern Capital Corp. v. Southern Pacific Co.*, 568 F.2d 590 (8th Cir. 1978), *cert. denied*, 98 S.C. 2821, 56 L.Ed.2d 770 (May 30, 1977); *Henderson v. Mann Theatres Corp.*, 65 Cal.App.3d 397, 135 Cal. Rptr. 266 (1976), *cert. denied*, 434 U.S. 825 (Oct. 3, 1977); *Feldman v. Great Northern Ry.*, 428 F.Supp. 979 (S.D. N.Y.); and *Radue v. Zanaty*, 293 Ala. 585, 308 So.2d 242 (1975). Indeed, this Court recently has refused to review these issues as indicated in the first two citations above which show the dates upon which this Court denied certiorari in the cited cases that involved the exact issues as the instant case.

II. The Courts Below Correctly Decided That the Gold Ownership Amendments Did Not Repeal the Joint Resolution and That Application of the Joint Resolution to Petitioners' Lease Does Not Violate Petitioner's Fifth Amendment Rights.

A. The gold ownership amendments did not expressly or impliedly repeal the joint resolution.

The Gold Ownership Amendments made it lawful for United States citizens again to own gold. Subsection (a) of the Gold Ownership Amendments (App. 3-4) repealed¹ Sections 3 and 4 of the Gold Reserve Act of 1934, 31 U.S.C. §§ 442 and 443 (App. 2), which had, respectively, empowered the Secretary of the Treasury to issue regulations prescribing the limited conditions under which gold could then be acquired, held and used (e.g., for mining operations and industrial, professional and artistic uses), and provided penalties for violation of such regulations. Subsection (b) of the Gold Ownership Amendments provides, in relevant part, that "(n)o provision of any law . . . may be construed to prohibit any person from purchasing, holding, selling, or otherwise dealing with gold."

There is simply no language in the Gold Ownership Amendments that would have effected the express repeal of the Joint Resolution. It was so held in *Southern Capital Corp. v. Southern Pacific Co.*, *Feldman v. Great Northern Ry.*, and *Henderson v. Mann Theatres Corp.*, *supra*. The only express repealer therein

¹ Repeal of Sections 3 and 4 of the Gold Reserve Act was accomplished in two steps by the Gold Ownership Amendments. Subsection (a) of the Gold Ownership Amendment of 1973 provided for such repeal, and subsection (b) for elimination of existing gold ownership prohibitions upon a finding by the President that the United States' international monetary position would not be adversely affected. The Gold Ownership Amendment of 1974 amended the Gold Ownership Amendment of 1973 by eliminating the gold ownership prohibitions on December 31, 1974, unless the President should have recommended such elimination prior to that date.

was of Sections 3 and 4 of the Gold Reserve Act, which dealt only with the acquisition and use of gold. The Joint Resolution was not mentioned in either Gold Ownership Amendment. Congress' silence in the Gold Ownership Amendments with respect to the Joint Resolution cannot be construed as an intention to repeal the Joint Resolution. A recognized rule of statutory construction is that the expression of certain things in a statute necessarily involves exclusion of other things not expressed—i.e., *expressio unius est exclusio alterius*. See, e.g., *Henderson v. Mann Theatres Corp.*, supra, 65 Cal.App.3d at 269.

Not only was there no express repeal, the Gold Ownership Amendments did not repeal the Joint Resolution by implication. Petitioners argue that the language in the Gold Ownership Amendments permitting U.S. citizens otherwise to deal with gold was intended by Congress to extend to all matters relating to gold, including its prohibited use as an index of monetary value. This argument was flatly rejected in the courts below and in *Southern Capital Corp. v. Southern Pacific Co.*, *Henderson v. Mann Theatres Corp.*, and *Feldman v. Great Northern Ry.*, supra.

Petitioners' argument is in direct conflict with the many rulings of this Court that repeals by implication are not favored. See, e.g., *Morton v. Mancari*, 417 U.S. 535, 549 (1974) and the cases cited therein. This Court's decision in *Morton* reaffirms the alternative requirements for implied repeal of an earlier statute by a later one—viz., (1) there must be an affirmative showing of a "clear and manifest intent" by Congress to repeal the earlier statute, or (2) the earlier and later statutes must be irreconcilable. Absent such intention and where the two statutes "are capable of co-existence," the courts must regard each as effective. *Morton*, supra, at 551. Petitioners have failed to demonstrate that either requirement has been satisfied, and are unable to do so.

As to the first requirement, there is nothing in the language of the Gold Ownership Amendments themselves, or in the legislative history of those enactments, that indicates affirmatively any Congressional intent to repeal the Joint Resolution. Indeed, all the available legislative history of the Gold Ownership Amendments mandates a contrary conclusion.

The testimony of the Chairman of the International Finance Subcommittee of the House Committee on Banking and Currency, which handled the Amendments, supports this conclusion:

"I want to emphasize that this would not mean that we intend to allow the writing of contracts in gold, or otherwise change the joint resolution on gold. Our intention is merely to allow individuals to buy, sell and own gold if and when it is possible to do this without sacrificing our national interest." 199 Cong. Rec. 16,968 (1973).

Moreover, officials of federal executive departments and independent agencies charged with monetary and banking administration have uniformly interpreted the Gold Ownership Amendments as not repealing or modifying the Joint Resolution. See Secretary of the Treasury's Statement of December 9, 1974, 122 Cong. Rec. S.9128 (daily ed. June 14, 1976);² Statements of the Board of Governors of the Federal Reserve Board, and the Comptroller of the Currency; and Statements of the Federal Deposit Insurance Corporation and Federal Home Loan

² On December 4, 1974, just a short time before the Gold Ownership Amendments became effective, Secretary of the Treasury William Simon testified before the House International Finance Subcommittee:

"Contracts payable alternatively in gold or in an amount of money measured thereby are both against public policy and unenforceable in our courts under the provisions of the Congressional Gold Clause Joint Resolution of 1933. *This clause continues to apply after the lifting of restrictions on bullion ownership.*" Hearings on H.R. 17475 Before the Subcomm. on International Finance of the House Comm. on Banking and Currency, 93d Cong., 2d Sess. 7 (1974). (Emphasis Supplied).

Bank Board, 4 CCH Fed. Banking L. Rep. ¶ 56,368 at 35,221-27 (1974). As a rule of statutory construction, these interpretations of the Gold Ownership Amendments are entitled to be given great weight by the courts. *Brodrick v. Oklahoma*, 413 U.S. 601, 617-618 (1973); *Udall v. Tallman*, 380 U.S. 1, 16 (1965).

As to the alternative requirement for implied repeal, the Joint Resolution and the Gold Ownership Amendments are not in conflict with each other and may be harmoniously construed. In enacting the Gold Ownership Amendments, Congress intended only to remove restrictions upon U.S. citizens in "purchasing, holding, selling or otherwise dealing in gold" as a commodity—i.e., to eliminate the restrictions on the use of gold as a commodity and to permit its acquisition for investment and speculative purposes. In enacting the Joint Resolution, Congress focused on debt obligations and other contracts, and intended, by demonetizing gold, to eliminate the interference of such provisions with its constitutional power to regulate the monetary system. *Norman v. Baltimore & O.R.R.*, *supra*. It is evident, then, that the Gold Ownership Amendments and the Joint Resolution deal with quite diverse subjects. Petitioners have failed to cite, nor can they cite, any authority to demonstrate that the Gold Ownership Amendments were intended to give gold a renewed monetary standing.

The lower courts herein and all other courts which have considered the question of implied repeal of the Joint Resolution by the Gold Ownership Amendments have held that there is no basic inconsistency, or positive repugnancy, in permitting the general range of activities incident to the ownership of gold as a commodity under the Gold Ownership Amendments, while denying by the Joint Resolution the right to enforce payment of obligations indexed to the value of gold. See, e.g. *Feldman v. Great Northern Ry.*; *Southern Capital Corp. v.*

Southern Pacific Co., and *Henderson v. Mann Theatres Corp.*, *supra*.

The 1977 Reaffirmation (App. 4) makes the Joint Resolution inapplicable to obligations issued on or after October 28, 1977 and, in effect, reaffirms the Joint Resolution with respect to obligations issued prior to that date. The Joint Resolution continues, therefore, to invalidate gold clause obligations issued prior to October 28, 1977, including the gold clause obligation in Petitioners' lease. Moreover, Congress' enactment of the 1977 Reaffirmation is near irrefutable evidence that the Gold Ownership Amendments did not repeal the Joint Resolution by implication. The Court in *Southern Capital Corporation v. Southern Pacific Company*, *supra*, correctly concluded that, "(i)f Congress had earlier intended to implicitly repeal the Joint Resolution (i.e., by the Gold Ownership Amendments), it is highly doubtful that the Act of October 28, 1977, would have been necessary." And as held by the Sixth Circuit Court of Appeals in the instant case with regard to the Act of October 28, 1977, which was not in effect when the District Court ruled, such enactment supports the trial judge's holding (Pet. App. 28). It is clear, therefore, that the courts below correctly decided that the Gold Ownership Amendments did not expressly or impliedly repeal the Joint Resolution.

It may be asked why Respondent has labored over the statutory phase of this case as one of the questions presented herein due to the fact that Petitioners have apparently dropped their contentions in this regard although they were argued at length below and are alluded to by Petitioners in their Petition. The answer is that by the exercise of following the scheme of legislation by Congress involved herein, as all the courts that have considered the issue have done, it becomes apparent (i) that not only were such courts correct in this phase of the case, but (ii) also that Congress carefully considered the effect of its legislation upon the Joint Resolution and the resulting effect upon citizens and thus decided, by the Act of October 28, 1977,

to make the Joint Resolution applicable only to obligations issued after that date. It is of this distinction that Petitioners primarily complain and such is discussed below.

B. Petitioners' substantive due process rights are not violated by application of the Joint Resolution to Petitioners' lease.

Petitioners contend that because the courts have held that the Joint Resolution was not expressly or implicitly repealed as to all obligations by Congress and because Congress by the Act of October 28, 1977 made the Joint Resolution applicable only to obligations issued after that date, Petitioners are being deprived of their property, the right to collect rent in or measured by gold under a pre-October 28, 1977 obligation, in violation of their substantive due process rights accorded by the Fifth Amendment to the Constitution of the United States.

Application of the Joint Resolution to the gold clause in Petitioners' lease first effective in 1927 does not violate Petitioners' Fifth Amendment substantive due process rights. The Joint Resolution was found constitutional in 1935 (*Norman v. Baltimore & O.R.R.*, 294 U.S. 240 (1935)) and it continues today to meet substantive due process standards.³

The Joint Resolution was an exercise of Congress' express power, granted in Paragraph 5 of Section 8, Article I of the United States Constitution, to "coin money, regulate the value thereof, and of foreign coin". *Norman, supra*, at 302-306. This power resides exclusively with Congress and the wisdom of monetary measures is a political, not judicial, question. *Julliard v. Greenman*, 110 U.S. 421 (1884). Even though the 1933 Joint Resolution invalidated the gold clauses in then-existing contracts, it met the only constitutional requirement for a mone-

³ It should be noted that Petitioners' due process arguments proceed on a basis discredited by this Court at least since its decision in *United States v. Carolene Products Co.*, 304 U.S. 144, 152 (1938).

tary measure to be valid: it was rationally related to a proper purpose and not arbitrary or capricious. *Norman, supra*, at 311.

The Joint Resolution has not lost its validity merely because time has passed, whether or not economic conditions have changed. Petitioners have the burden of showing that no reasonable state of facts can be conceived which supports its continued application. *United States v. Carolene Products Co.*, *supra*; cf. *Kelley v. Johnson*, 425 U.S. 238 (1976). Courts do not invalidate legislation simply because some think it unwise or because there might be a more reasonable means to the end sought. Cf. *Williamson v. Lee Optical*, 348 U.S. 438, 488 (1955). Petitioners must demonstrate that there is no monetary or other Congressional policy to which continued application of the Joint Resolution as to pre-October 28, 1977 obligations bears a rational relation. *United States v. Carolene Products Co.*, *supra*. Petitioners have not met and cannot meet this burden. Indeed, the 1977 Reaffirmation constitutes an express finding by Congress that the Joint Resolution was not to be retroactively repealed. In order to grant Petitioners the relief they seek, the 1977 Reaffirmation would have to be invalidated as well.

Although the words "equal protection" are not used by Petitioners in their argument, the charge that the application of the Joint Resolution only to obligations issued prior to October 28, 1977 violates the equal protection requirements of the Fifth Amendment is inherent in Petitioners' argument but such is without merit.

Congress' paramount monetary power permits it to adopt statutory schemes which may seem unfair to some. *Holyoke Water Power Co. v. American Writing Paper Co.*, 300 U.S. 324 (1936). Where legislation involves a national interest, as does the Joint Resolution, Congress may be justified in discriminating in a way which would be unacceptable if imposed by a state. *Hampton v. Mow Sun Wong*, 426 U.S. 88, 100 (1976). However, even if the Joint Resolution were subjected to equal pro-

tection analysis it would be found valid: the Joint Resolution does not discriminate against a suspect class, does not infringe a fundamental right, and is not arbitrary or capricious. It fully satisfies the equal protection tests set forth in *New Orleans v. Dukes*, 427 U.S. 297, 303 (1976). Petitioners have not demonstrated, and cannot, that the classifications effected by the Joint Resolution are not rationally related to a legitimate purpose. Many suggestions as to why Congress adopted the classification it did could be made but one will suffice. Gold clauses were widespread before the adoption of the Joint Resolution in 1933. They were contained in a large number of debt and lease instruments issued prior to 1933 but to run for a great number of years. Since 1933 many of those obligations have changed hands and the transactions were made and obligations assumed upon the premise that currency, not gold or an amount of currency measured by gold, would be used in a fixed amount to pay those obligations. The premise that Congress did not wish to drastically alter the obligations under these old instruments and change the expectations of parties under obligations assumed to have been fixed over 40 years ago with resulting dislocation to public, semi-public and private financial affairs and yet was willing to now let citizens, fully aware of the possible consequences of their acts, contract after October 28, 1977 to index obligations to gold is a reasonable basis for the resulting classification. Therefore, it is clear that the courts below correctly decided that Petitioners' substantive due process rights are not violated by application of the Joint Resolution to Petitioners' lease.

CONCLUSION

As the courts below correctly decided, the Gold Ownership Amendments did not repeal the Joint Resolution and Petitioners' Fifth Amendment rights are not violated by application of the Joint Resolution to the gold clause in Petitioners' lease. The Petition for a Writ of Certiorari should, therefore, be denied.

Dated: December 18th, 1978.

Respectfully submitted,

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Certificate of Service

I hereby certify that on this 18th day of December, 1978, three copies of Respondent's Brief in Opposition to Petition for Writ of Certiorari were mailed, postage prepaid, to Crawford McDonald, PO Box 123, 150 East Court Avenue, Memphis, Tennessee 38101, to Henry M. Beaty, Jr., 44 North Second Street, Suite 703, Memphis, Tennessee 38103, and to Charles Niles Grosvenor, III, 1778 Glenwood Place, Memphis, Tennessee 38104. I further certify that all parties required to be served have been served.

Joe M. Duncan

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APPENDIX

— A-1 —

APPENDIX

**Joint Resolution of June 5, 1933, ch. 48, § 1,
48 Stat. 112-13, 31 U.S.C. § 463**

To assure uniform value to the coins and currencies of the United States.

Whereas the holding of or dealing in gold affect the public interest, and are therefore subject to proper regulation and restriction; and

Whereas the existing emergency has disclosed that provisions of obligations which purport to give the obligee a right to require payment in gold or a particular kind of coin or currency of the United States, or in an amount in money of the United States measured thereby, obstruct the power of the Congress to regulate the value of the money of the United States, and are inconsistent with the declared policy of the Congress to maintain at all times the equal power of every dollar, coined or issued by the United States, in the markets and in the payment of debts. Now, therefore, be it

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That (a) every provision contained in or made with respect to any obligation which purports to give the obligee a right to require payment in gold or a particular kind of coin or currency, or in an amount in money of the United States measured thereby, is declared to be against public policy; and no such provision shall be contained in or made with respect to any obligation hereafter incurred. Every obligation, heretofore or hereafter incurred, whether or not any such provision is contained therein or made with respect thereto, shall be discharged upon payment, dollar for dollar, in any coin or currency which at the time of payment

is legal tender for public and private debts. Any such provision contained in any law authorizing obligations to be issued by or under authority of the United States, is hereby repealed, but the repeal of any such provision shall not invalidate any other provision or authority contained in such law.

(b) As used in this resolution, the term "obligation" means an obligation (including every obligation of and to the United States, excepting currency) payable in money of the United States; and the term "coin or currency" means coin or currency of the United States, including Federal Reserve notes and circulating notes of Federal Reserve banks and national banking associations.

**Gold Reserve Act of 1934, Secs. 3 and 4, ch. 6,
§§ 3-4, 48 Stat. 337-38, 31 U.S.C.
§§ 442, 443 (repealed)**

SEC. 3. The Secretary of the Treasury shall, by regulations issued hereunder, with the approval of the President, prescribe the conditions under which gold may be acquired and held, transported, melted or treated, imported, exported, or earmarked: (a) for industrial, professional, and artistic use; (b) by the Federal Reserve banks for the purpose of settling international balances; and, (c) for such other purposes as in his judgment are not inconsistent with the purposes of this Act. Gold in any form may be acquired, transported, melted or treated, imported, exported, or earmarked or held in custody for foreign or domestic account (except on behalf of the United States) only to the extent permitted by, and subject to the conditions prescribed in, or pursuant to, such regulations. Such regulations may exempt from the provisions of this section, in whole or in part, gold situated in the Philippine Islands or other places beyond the limits of the continental United States.

SEC. 4. Any gold withheld, acquired, transported, melted or treated, imported, exported, or earmarked or held in custody, in violation of this Act or of any regulations issued hereunder, or licenses issued pursuant thereto, shall be forfeited to the United States, and may be seized and condemned by like proceedings as those provided by law for the forfeiture, seizure, and condemnation of property imported into the United States contrary to law; and in addition any person failing to comply with the provisions of this Act or of any such regulations or licenses, shall be subject to a penalty equal to twice the value of the gold in respect of which such failure occurred.

**Gold Reserve Act of 1934, Sec. 5, 31 U.S.C.
§ 315b, ch. 6, § 5, 48 Stat. 340**

No gold shall after January 30, 1934, be coined, and no gold coin shall after January 30, 1934, be paid out or delivered by the United States: *Provided, however,* That coinage may continue to be executed by the mints of the United States for foreign countries in accordance with section 367 of this title. All gold coin of the United States shall be withdrawn from circulation, and, together with all other gold owned by the United States, shall be formed into bars of such weights and degrees of fineness as the Secretary of the Treasury may direct. Act of Sept. 21, 1933, Sec. 3, Pub. L. No. 93-110, 87 Stat. 352

("Gold Ownership Amendment of 1973")

Sec. 3. (a) Sections 3 and 4 of the Gold Reserve Act of 1934 (31 U.S.C. 442 and 443) are repealed.

(b) No provision of any law in effect on the date of enactment of this Act, and no rule, regulation, or order under authority of any such law, may be construed to prohibit any person

from purchasing, holding, selling, or otherwise dealing with gold.

(c) The provisions of this section, pertaining to gold, shall take effect when the President finds and reports to the Congress that international monetary reform shall have proceeded to the point where elimination of regulations on private ownership of gold will not adversely affect the United States' international monetary position.

**Act of Aug. 14, 1974, Sec. 2, Pub. L. No. 93-373, 88 Stat. 445
("Gold Ownership Amendment of 1974")**

Sec. 2. Subsections 3(b) and (c) of Public Law 93-110 (87 Stat. 352) are repealed and in lieu thereof add the following:

"(b) No provision of any law in effect on the date of enactment of this Act, and no rule, regulation, or order in effect on the date subsections (a) and (b) become effective may be construed to prohibit any person from purchasing, holding, selling, or otherwise dealing with gold in the United States or abroad.

"(c) The provisions of subsections (a) and (b) of this section shall take effect either on December 31, 1974, or at any time prior to such date that the President finds and reports to Congress that international monetary reform shall have proceeded to the point where elimination of regulations on private ownership of gold will not adversely affect the United States' international monetary position."

**Act of Oct. 28, 1977, Sec. 4(c), Pub. L. 95-147, 91 Stat. 1229
(the "1977 Reaffirmation")**

The joint resolution entitled "joint resolution to assure uniform value to the coins and currencies of the United States", approved June 5, 1933 (31 U.S.C. 463), shall not apply to obligations issued on or after the date of enactment of this section."